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In the Supreme Court of the United States

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OCTOBER TERM, 1971

No. 71-1099

PHOENIX NEWSPAPERS, INC., an Arizona corporation; EUGENE C. PULLIAM and ALBERT J. SITTER,

Petitioners,

v.

JULIAN PEAGLER and DODGE CITY MOTORS, INC., an Arizona corporation,

Respondents.

On Petition for a Writ of Certiorari to the Superior Court of the State of Arizona, in and for the County of Maricopa and the Arizona Supreme Court

Petitioners' Reply to Respondents' Brief in Opposition

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I

Point 1—The Final Judgment Question

The entire thrust of respondents' position in regard to jurisdiction is that the orders from the Arizona Superior Court and Arizona Supreme Court are not "final" orders and the Court should therefore decline jurisdiction pursuant to 28 U.S.C. § 1257(3).

The argument by respondents in this regard totally ignores both the "chilling effect" considerations embodied in

Dombrowski v. Pfister, 380 U.S. 479 (1965); *Mills v. Alabama,* 384 U.S. 214 (1966); and *Rosenbloom v. Metromedia,* 403 U.S. 29 (1971) as well as the compelling rationale from *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541 (1949). The Arizona courts' refusal to act upon petitioners' claims of invasion of first amendment rights constitutes a final denial of this independent constitutional right, "separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. at 546.

Indeed, as pointed out by respondents, the Arizona Supreme Court has not once, but thrice refused to halt this unwarranted invasion of first amendment rights. In light of the Arizona courts' refusal to apply the rules enunciated by the Court as to the mandates of the Federal Constitution, [*see e.g., Cooper v. Aaron,* 358 U.S. 1, 18 (1958)] the futility, frustration, and "chilling effect" of prolonging this state court litigation ought not to be permitted.

II

Point 2—First Amendment Protection Question

The sole argument raised in support of the position that there was sufficient showing of "actual malice" to withstand the granting of petitioners' motion for summary judgment is that the witness Runser denied in her deposition making the statements attributed to her in the newspaper article.

Even if the Runser deposition testimony amounted to such a denial, this would not constitute "clear and convincing proof" that the material was published with knowledge it was false or with reckless disregard of truth or falsity. *Rosenbloom v. Metromedia, supra; Wasserman v. Time, Inc.,* 424 F.2d 920 (D.C. Cir. 1970).

However, a reading of the Runser deposition discloses that the statements in the article attributed to her were substantially accurate:

> Q. As a matter of fact, did the file at Better Business Bureau have a large number of complaints against Peaglers Dodge City?
>
> A. Yes, sir.
>
> Q. Against Carpetime?
>
> A. Yes, sir.
>
> Q. Against Family Services?
>
> A. Yes, sir.
>
> Q. What did you tell him [Sitter] with respect to the complaints that were filed involving Peaglers Dodge City or Carpetime or the other one?
>
> A. I told him during my employment of handling the complaints that I indeed had received a large volume in comparison to the other car dealers and such, I received the most from Peaglers.
>
> Q. The distinction was with reference to car dealers that you were speaking of and not with respect to business in general, is that correct?
>
> A. What I told Mr. Sitter?
>
> Q. Yes.
>
> A. That during my employment Peagler received the most of any company in any area than any other company or any other business.[1]
>
> Q. Are you speaking about business or automobile business?
>
> A. Any type of business.[2]

(Runser deposition transcript, p. 39, l. 3 to p. 40, l. 3.)

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1. This answer is set forth as it originally appears in the deposition. The deposition after being transcribed was submitted to Mrs. Runser for her to read and correct in accordance with Rule 30(e), ARIZ. R. CIV. P. (identical to Rule 30(e), FED. R. CIV. P.) Mrs. Runser "corrected" this answer so that it now reads: "That during my employment Peagler received the most of any company in the area of automobile dealerships."

2. This answer now reads: "Automobile business." See note 1, *supra*.

Q. In response to a question by Mr. Wilmer, I think you made a statement to the effect that Peaglers Dodge City had received the most complaints in the Better Business Bureau. Did you mean to say that?

A. Shall I say what I meant to say?

Q. Did you mean to say that?

A. No.

Q. What did you mean to say?

A. In the length of time that I worked there they had received, to my recollection, the heaviest flow of complaints.[3] (p. 58, l. 3 to 14.)

Respondents' reliance on *Goldwater v. Ginzburg*, 414 F.2d 324 (CA2 1969) appears not only to be misplaced, but *Ginzburg* clearly points up the contrast between a situation where there was a sufficient showing of actual malice and the situation in the instant case.

In *Ginzburg*, the trial court, upon denying Ginzburg's motion for summary judgment, specifically listed the evidentiary material from which the jury could find actual malice:

1. The covering letter with which the questionnaire was mailed to the psychiatrists.

2. Ginzburg had information about the 'nervous breakdowns' mentioned in the covering letter from one source only, and did not know whether or not that source had the information from personal knowledge.

3. In showing how the psychiatrists' letters were signed, 'name withheld' was used interchangeably with 'anonymous,' that is, replies which were unsigned were shown as 'name withheld' which might be found to suggest that they had been signed.

4. A letter from the Medical Director of the American Psychiatric Association warned of the invalidity of the Fact survey because responses were sought

3. This answer now reads: "In the length of time that I worked there they had received, to my recollection, the heaviest flow of complaints in the automobile industry." See note 1, *supra*.

despite the fact that none of those asked to respond had made a 'thorough clinical examination,' Ginzburg read this letter before he published the magazine. The letter was not published with the questionnaire.

5. Ginzburg did not read in their entirety articles from which he took quotes to supply the basis for his own piece. Instead, he read only the parts underscored for him by others. Thus, at times he would quote one part of an article without quoting another part which might tend to qualify or contradict the part quoted. He omitted contradictory material within the same sentence when quoting from that sentence.

6. There are some statements in Ginzburg's article for which he could not establish a basis on his deposition.

7. There is much to indicate alteration of responses from the psychiatrists. For example:

a. a *signed* letter which was critical of the Fact survey was published as 'anonymous';

b. one published 'letter' was in fact a distillation of the original, done by Ginzburg, without so indicating in the magazine;

c. there were occasions when two responses were published as one reply;

d. in one letter the words were changed and rewritten by Ginzburg;

e. on two occasions qualifying paragraphs in a response were omitted when published; and

f. Ginzburg testified as to one response that he 'didn't even consider' whether it was true or false, and that all he cared about was printing what the man said. Goldwater v. Ginzburg, *supra* 261 F.Supp. at 787. 414 F.2d at 336-337. (Emphasis Original)

Discussing this evidence the Second Circuit said:

As can be seen, appellee and the district judge did not rely on a few isolated instances of derogatory statements which could be charitably thought of as being nonactionable negligent or good faith misstatements of fact, but rather upon the totality of appel-

lants' conduct, as evidenced by the proffered materials, from which a jury might reasonably find a *predetermined and preconceived plan to malign the Senator's character*. The fact that appellants' supporting affidavit denied that the 'Goldwater issue' had been published with actual malice does not require that their motion for summary judgment be granted, *especially in light of appellee's countering materials*. St. Amant v. Thompson, 390 U.S. 727, 732, 88 S. Ct. 1323, 20 L.Ed.2d 262 (1968).

414 F.2d at 337. (Emphasis supplied.)

Petitioners have no quarrel with the result in *Ginzburg;* it was proper under its facts. However, the failure of the Arizona courts to require respondents in this case to come forth with a similar showing in opposition to petitioners' motion for summary judgment demonstrates the refusal of the Arizona courts to protect petitioners' first amendment rights in accordance with the mandates of the Court.

CONCLUSION

For the foregoing reasons and for the reasons set forth in petitioners' Petition, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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